



6450-01-P

DEPARTMENT OF ENERGY

10 CFR Part 1047

RIN: 1994-AA03

Authority of DOE Protective Force Officers that are Federal Employees to Make Arrests Without a Warrant for Certain Crimes

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Final rule.

SUMMARY: Section 161 k. of the Atomic Energy Act, as amended, empowers the Secretary of Energy (“the Secretary”) to authorize designated U.S. Department of Energy (DOE) employees and contractors to make an arrest without a warrant for certain crimes. Specifically, the Secretary may authorize the arrest of any individual who has committed a federal crime in the presence of a DOE protective force officer regarding the property of the United States in the custody of DOE or DOE contractors. The Secretary may also authorize the arrest of any individual who is reasonably believed to have committed or to be committing a felony regarding the property of the United States in the custody of DOE or DOE contractors. Pursuant to this authority, DOE adds misdemeanor and felony

violations of Assaulting a Federal Officer to the enumerated criminal violations for which DOE protective force officers that are federal employees may execute an arrest without a warrant, as set forth in DOE regulations.

DATES: The rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background and Authority
II. Synopsis of the Rule
III. Regulatory Procedures, Justification for Final Rule
Administrative Procedure Act
Review Under Executive Order 12866
Review Under the Regulatory Flexibility Act
Review Under the Paperwork Reduction Act
Review Under the National Environmental Policy Act of 1969
Review Under Executive Order 13132
Review Under Executive Order 12988
Review Under the Unfunded Mandates Reform Act of 1995
Review Under the Treasury and General Government Appropriations Act, 1999
Review Under Executive Order 12630
Review Under the Treasury and General Government Appropriations Act, 2001
Review Under Executive Order 13211

Congressional Notification
IV. Approval of the Office of the Secretary

I. Background and Authority

Section 161 k. of the Atomic Energy Act of 1954 (AEA), as amended by Pub. L. 105-394 (codified at 42 U.S.C. 2201(k)), empowers the Secretary of Energy (“the Secretary”) to authorize designated members, officer, employees, contractors, and subcontractors of the Department of Energy (DOE) to carry firearms while discharging their official duties. Section 161 k. further provides that the Secretary may authorize these designated officials to make an arrest without a warrant for any federal crime regarding the property of the United States in the custody of DOE or a DOE contractor and for any federal felony regarding the property of the United States in the custody of DOE or a DOE contractor that a designated official reasonably believes is being or has been committed. Lastly, section 161 k. authorizes the Secretary to issue guidelines, with the approval of the Attorney General, to implement this authority.

The Secretary has previously exercised this authority to sanction arrests without warrants for certain federal crimes through the regulation at 10 CFR 1047.4. This section enumerates the federal crimes for which a DOE protective force officer may execute a warrantless arrest. These crimes are incorporated by reference to the appropriate section of the United States Code. Consistent with section 161 k. of the AEA, however, 10 CFR 1047.4 makes clear that such authority is limited to the included crimes and may only be exercised “if the property of the United States which is in the custody of the DOE or its contractors is involved.” Additionally, 10 CFR 1047.4(b) and 10 CFR 1047.4(c) set forth

the necessary facts to effectuate a valid warrantless arrest for a felony and a misdemeanor, respectively. 10 CFR 1047.4(b) states that an arrest may be executed on the basis of an enumerated felony either if it is committed in the presence of a DOE protective force officer or if a DOE protective force officer reasonably believes that a felony has been or is being committed. In contrast, 10 CFR 1047.4(c) states that an arrest may only be executed on the basis of an enumerated misdemeanor if it occurs in the presence of a DOE protective force officer.

II. Synopsis of the Rule

With this rule, DOE is establishing a new subsection within 10 CFR 1047.4(a) (1) to add 18 U.S.C. 111 (“Assaulting, resisting, or impeding certain officers or employees”) to the list of enumerated federal crimes for which DOE protective force officers that are federal employees¹ may execute a warrantless arrest. In relevant part, this statute criminalizes the activity of anyone who “forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties.” 18 U.S.C. 111. As defined in 18 U.S.C. 1114, section 111 applies to actions taken against “any officer or employee of the United States or of any agency in any branch in the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance.” Specifically, DOE is adding reference to felony and misdemeanor

¹ All of the crimes currently listed in 10 CFR 1047.4(a) (1) may serve as the basis for an arrest by any DOE protective force officer, including those who are non-federal, contract employees.

violations of 18 U.S.C. 111 at 10 CFR 1047(a)(1)(iii). To retain consistency, DOE is also amending 10 CFR 1047.4(b) and 10 CFR 1047.4(c) to incorporate the newly added 10 CFR 1047(a)(1)(iii).

DOE believes that this change is necessary to ensure that DOE protective force officers that are federal employees may effectively protect United States property in the custody of DOE and DOE contractors. Authorizing DOE protective force officers that are federal employees to arrest individuals who impede the official duties of DOE protective force personnel allows them to immediately neutralize any individual who poses an existing and ongoing threat to both the integrity of the property of the United States and the ability of DOE to retain custody of such property.

The 18 U.S.C. 111 statute is similar in nature to many of the crimes for which the Secretary has previously delegated arrest authority by reference in 10 CFR 1047.4(a), including civil disorder, 18 U.S.C. 231, conspiracy, 18 U.S.C. 371, damage to or destruction of government property, 18 U.S.C. 2112, destruction of motor vehicles, 18 U.S.C. 33, unlawful use of explosives, 18 U.S.C. 844(f), and sabotage, 18 U.S.C. 2151, 2153-2156. *See* 50 FR 30926 (July 31, 1985).

III. Regulatory Procedures, Justification for Final Rule.

Administrative Procedure Act

Pursuant to authority at 5 U.S.C. 553 (b)(B), DOE finds good cause to waive the requirement to provide prior notice and an opportunity for public comment for this

rulemaking as such procedures would be impracticable and contrary to the public interest. DOE believes that this change is necessary to ensure that Federal Agents may effectively protect ongoing shipments of nuclear weapons, nuclear components and special nuclear materials in the custody of DOE. Authorizing DOE protective force officers to detain or arrest individuals who impede the official duties of DOE protective force personnel allows them to act quickly to disrupt situations that pose an existing and ongoing threat to both the integrity of the property of the United States and the ability of DOE to retain custody of such property. The extraordinary sensitivity of the cargo in the custody of DOE warrants immediate action to reduce the risks to DOE Federal Agents' ability to carry out their protective function.

For the same reason, DOE finds good cause pursuant to authority at 5 U.S.C. 553(d)(3), to waive the requirement that this rule be delayed in effective date 30 days after the date of publication. As such, this rule will be effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Review Under Executive Order 12866

This rulemaking is not a “significant regulatory action” under section 3(f) (1) of Executive Order 12866 and the principles reaffirmed in Executive Order 13563 because it will not have an economic impact of \$100 million, it does not create a serious inconsistency with other agency actions, will not materially impact any budget, and does not raise novel legal or policy issues. Accordingly, today’s action was not subject to review by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel’s website (<http://energy.gov/gc/office-general-counsel>).

Because this rule is not subject to the requirement that the agency provide prior notice and an opportunity for public comment pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act are inapplicable to this rulemaking. DOE notes that this final rule would empower DOE protective force officers that are federal employees to arrest individuals who violate 18 U.S.C. 111 when such a violation involves the property of the United States in the custody of DOE or a DOE contractor. This rule is a matter of law enforcement procedure and does not impose any requirement on any small entities.

Review Under the Paperwork Reduction Act

This rulemaking imposes no new information or record keeping requirements. Accordingly, Office of Management and Budget clearance is not required under the Paperwork Reduction Act. 44 U.S.C. 3501 *et seq.*

Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act of 1969, DOE has determined that this rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.5 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to rulemakings "amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amending." The arrest authority of DOE protective force officers has no significant impact on the environment. Therefore, DOE does not need to prepare an Environmental Assessment or Environmental Impact Statement for this rule.

Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have a process of accountability to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications.

This publication is intended to put both States and the general public on notice of this final rule.

Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law; this final rule meets the relevant standards of Executive Order 12988.

Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Pub. L. 104-4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. 2 U.S.C. 1532(a), (b). The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a “significant intergovernmental mandate,” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820 (Mar. 18, 1997). DOE’s policy statement is also available at <http://energy.gov/gc/office-general-counsel>. This final rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of \$100 million or more in any year, so the UMRA does not apply.

Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on

the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today’s final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

Review Under Executive Order 13211

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any significant energy action. A “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and

that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, an agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that this regulatory action is not a significant energy action because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on the final rule.

Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a “major rule” as defined by 5 U.S.C. 804(2).

IV. Approval of the Office of the Secretary

The Office of the Secretary of Energy has approved the issuance of this final rule.

List of Subjects in 10 CFR Part 1047

Government contracts, Law enforcement, Nuclear energy.

Issued in Washington, DC, on March 23, 2015.

Ernest J. Moniz

Secretary

For the reasons set forth in the preamble, DOE is amending part 1047 of chapter X of title 10 of the Code of Federal Regulations, to read as set forth below:

PART 1047 – LIMITED ARREST AUTHORITY AND USE OF FORCE BY PROTECTIVE FORCE OFFICERS

1. The authority citation for part 1047 continues to read as follows:

Authority: Sec. 2201, Pub. L. 83-703, 68 Stat. 919 (42 U.S.C. 2011 *et seq.*);

Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*).

2. Section 1047.4 is amended by:

- a. Adding paragraph (a)(1)(iii); and
- b. Revising paragraphs (b) and (c).

The addition and revisions read as follows:

§1047.4 Arrest authority.

(a) * * *

(1) * * *

(iii) *Assaulting, resisting, or impeding certain officers or employees – 18 U.S.C.*

111. Both the felony and misdemeanor level offenses may only be enforced by protective force officers that are federal employees.

* * * * *

(b) *Felony Arrests.* A protective force officer is authorized to make an arrest for any felony listed in paragraph (a)(1)(i) or (a)(2)(i) of this section if the offense is committed in the presence of the protective force officer or if he or she has reasonable grounds to believe that the individual to be arrested has committed or is committing the felony.

(c) *Misdemeanor Arrest.* A protective force officer is authorized to make an arrest for any misdemeanor listed in paragraph (a)(1)(ii) or (a)(2)(ii) of this section if the offense is committed in the presence of the protective force officer.

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